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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-430

MODERN AIR TRANSPORT, INC.,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT NO. 145,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN BACHELLER, JR.
Counsel of Record
WILLIAM F. KASPERS
First National Bank Tower
Atlanta, Georgia 30303
Attorneys for Petitioner

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DISTRICT NO. 145,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
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FOR THE FIFTH CIRCUIT

Modern Air Transport, Inc., Petitioner herein, by and through its undersigned counsel, petitions this Court for a Writ of Certiorari to review the Decision of the United States Court of Appeals for the Fifth Circuit, rendered and entered in this case on June 20, 1974, reversing the findings of fact and conclusions of law rendered by the United States District Court for the Southern District of Florida on November 13, 1974, but nevertheless affirming the order of the United States District Court for the Southern District of Florida entered on

November 30, 1974, said order granting enforcement of an arbitrator's award rendered on March 29, 1972.

OPINIONS BELOW

The decision and judgment of the Court of Appeals (App.A, infra, pp.1-A - 13-A)[1] is reported at 495 F.2d 1241 (5th Cir.1974). The decision and order of the United States District Court for the Southern District of Florida (App.B, infra, pp.14-A - 24-A) is to date unreported. The final judgment of the United States District Court for the Southern District of Florida (App.C, infra, pp. 25-A - 26-A) is also unreported, as is the decision and award of the arbitrator (App.D, infra, pp. 27-A - 54-A).

JURISDICTION

The decision and judgment of the Court of Appeals was rendered and entered on June 20, 1974 (App.A, infra, pp. 1-A - 13-A). On September 16, 1974, this Court rendered an Order extending the time for filing a petition for Writ of Certiorari to and including October 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and the provisions of the Railway Labor Act, 45 U.S.C. §151, et seq.

QUESTION PRESENTED

Whether an arbitrator's rewriting of the language of a collective bar-

1/ All references to "App." are references to the Appendix hereto designated by the reference.

gaining agreement is within the arbitrator's authority to interpret the agreement and thus outside the scope of judicial review.

STATUTE INVOLVED

The Railway Labor Act, as amended, 45 U.S.C. § 151, et seq., insofar as is here pertinent, provides:

> Section 204: The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of Section 3, Title I, of this Act.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this Act shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this title, from mutually agreeing to the establishment of a national board of adjustment of temporary duration and of similarly limited jurisdiction. 45 U.S.C. §184.

STATEMENT OF THE CASE

I. The Factual Background and the Arbitrator's Award

Petitioner, Modern Air Transport, Inc. (hereinafter referred to as the Company), and Respondent, International Association of Machinists and Aerospace Workers, District No. 145 (hereinafter referred to as the Union), are parties to a collective bargaining agreement dated December 28, 1970.

In July, 1971, the Company sent several jet engines to American Airmotive Corporation, an FAA approved jet engine repair agency, for repair. The Union contended that this action violated Section 24 of the collective bargaining agreement, and, pursuant to the grievance and arbitration procedure of the collective bargaining agreement, the case was duly submitted to a System Board of Adjustment, Laurence E. Seibel presiding as impartial arbitrator.

Section 29 of the agreement specifically limited the authority of the System Board of Adjustment and the impartial arbitrator, by providing:

> D. The Board shall have jurisdiction over disputes between any employee covered by the . . .

> agreement and the company, growing out of grievances or out of interpretation or application of any of the terms of the . . . agreement. The jurisdiction of the Board shall not extend to proposed changes in hours of employment, rates of compensation, or working conditions covered by existing agreements between the parties hereto.

The agreement further provided, in Section 24(a) with respect to contracting out, in part as follows:

> The parties agree that the company may:
>
> 1. Continue to contract out work heretofore customarily contracted out.
>
> 2. Return equipment, parts or assemblies to the manufacturer or to an approved agency for repair or replacement.
>
> 3. Purchase necessary parts, equipment or facilities.
>
> 4. Contract out work when the company's facilities are not

> sufficient or available, or where employees available do not have the experience and ability to satisfactorily perform the work required, provided that the above does not result in a reduction in force of the employees covered by this agreement. In which case representatives of the company and the union will meet without delay and negotiate the proper provisions for the protection of employees' seniority and other property rights.

Notwithstanding the above provisions of the collective bargaining agreement, the arbitrator in this case substituted the word "exclusively" for the word "customarily" in Section 24(a)1, stating:

> . . . There would appear to be and [sic] implication in the use of the words [sic] "customarily" in sub-paragraph 1 sub-section (a) that the authority specified therein relates to work that has been exclusively contracted out." (App. B, infra, p. 47-A, emphasis in original).

Based upon such a re-writing of the language of the agreement, the arbitrator

held that the Company's sending of jet engine repair work to the FAA approved repair agency, American Airmotive Corporation, violated Section 24 of the contract, stating:

> . . .The fact remains that some "initial" modification work has been performed by bargaining unit employees and it cannot be thus concluded that such work has been "exclusively" contracted out. This is equally true for engine repair work. (App. D, infra, p. 47-A, emphasis in original).

Moreover, the specific factual findings set forth in the arbitrator's decision clearly reveal that the underlying basis of the arbitrator's holding was his substitution of the word "exclusively" for the word "customarily" in the language of Section 24(a) of the agreement. For the arbitrator specifically found that the bulk of the engine repair work in question had been contracted out prior to the effective date of the contract (App. D, infra, pp. 33-A - 34-A; pp. 47-A - 48-A); that American Airmotive Corporation, the Company to which the engines in question were sent, was ". . . an approved agency for the repair of the engine in question" (App. D, infra, p. 33-A); that the parties clearly intended to

provide considerable flexibility to the company with respect to the contracting out of work (App. D, infra, p. 46-A); and that the parties had set forth in Section 24(a), sub-paragraphs 1-4 of the agreement, the four distinct circumstances under which the company could contract out work (App. D, infra, p. 46-A).

II. The Decision of the District Court

The Union petitioned the United States District Court for the Southern District of Florida for enforcement of the arbitrator's award. The company resisted, contending that the arbitrator's opinion manifested an utter infidelity to his contractual obligation to confine himself to interpretation and application of the collective bargaining agreement, and that the award was therefore unenforceable.

The District Court found that the arbitrator's substitution of the word "exclusively" for the word "customarily" as the underlying basis of the award was ". . . completely improper . . . so clearly improper as to not really deserve much more comment" (App. B, infra, p. 15-A).

The lower court nevertheless enforced the arbitrator's award "for reasons completely different from those" stated

by the arbitrator (App. B, infra, p. 18-A).

In the lower court's opinion, the arbitrator could have arrived at the result that he reached, even if he had not exceeded his authority by changing the express language of Section 24(a)1 of the agreement (App. B, infra, p. 18-A). The District Court therefore saw no reason to refuse enforcement and send the case back to the arbitrator (App. B, infra, p.19-A).

III. The Decision of the Court of Appeals

The Company appealed the District Court's decision to the United States Court of Appeals for the Fifth Circuit, insisting that, once the lower court had concluded that the arbitrator's substitution of "exclusively" for "customarily" in Section 24(a)1 of the agreement as the underlying basis for the award was "completely improper", it had no authority to proceed further but instead should have simply denied enforcement of the award.

The Court of Appeals agreed with the Company's position, holding that:

> The proper course for the District Court would have been to deny enforcement upon the finding that the arbitrator manifested an "infidelity

to his obligation." App. A, infra, p. 11-A - 12-A.

However, the Court of Appeals went on to hold that the arbitrator's substitution of the word "exclusively" for "customarily" in Section 24(a)1 of the agreement was within his fundamental authority to interpret the contract, and the District Court's conclusion that such a substitution was "completely improper" was therefore itself improper. The Court of Appeals therefore affirmed the District Court's result, enforcing the arbitrator's award, while at the same time reversing the method by which the lower court arrived at such a result.

REASONS FOR GRANTING THE WRIT

I. THE DECISION HEREIN INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SPECIFICALLY CONSIDERED AND SETTLED BY THIS COURT. MOREOVER, THE DECISION HEREIN IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS WHICH HAVE ADDRESSED THIS QUESTION.

As the portions of the arbitrator's decision cited in the Statement of the Case indicate (pp. 5-9, supra), it is undisputed that the arbitrator substituted his own word, "exclusively" for the contractual term, "customarily", in Section

24(a)1 of the agreement. It is also undisputed that such a substitution was the underlying basis of the arbitrator's award.

The question at issue in this case, therefore, is whether such a substitution was within the fundamental authority of the arbitrator to interpret the agreement, whether such a substitution could be used as the underlying basis of the award, and whether the arbitrator's decision is thus outside the scope of judicial review. As mentioned, supra, the District Court, after a full and complete evidentiary hearing, held such a substitution to be "completely improper." On the other hand, the Court of Appeals held such a substitution to be within the fundamental authority of the arbitrator to interpret the agreement.

The only decision of this Court which has addressed the general question of the scope of judicial review of an arbitrator's award in a case involving a dispute arising out of a collective bargaining agreement is United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). In that case, this Court held that it was not a proper function of a federal court to review an arbitrator's decision which is to some extent ambiguous. In arriving at such a result, this Court stated:

> A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. 363 U.S. at 597.

While thus limiting the scope of judicial review of an arbitrator's award, this Court went on to state in its Enterprise Wheel decision:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice . . . his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, the courts have no choice but to refuse enforcement of the award. 363 U.S. at 597.

The instant arbitration award is clearly distinguishable from the arbitration award in issue in Enterprise Wheel. Unlike the award in Enterprise Wheel, there is no ambiguity in the instant award. Rather, the award clearly and unambiguously substituted the arbitrator's term "exclusively," for the Parties' term "customarily," in Section 24(a)(1) of the

Agreement. Such a substitution does not simply contain an "inference that the arbitrator may have exceeded his authority" by substituting his own language for the language of the agreement, but instead clearly indicates that the arbitrator did in fact exceed his authority.

The instant arbitrator's obligation was to take the facts as he found them and determine, as Section 24(a)(1) of the Agreement required, whether those facts established that the work contracted out was "heretofore customarily contracted out." Consistent with this obligation, the arbitrator was not authorized under the guise of interpretation, to change the relevant provision of the agreement by substituting the word "exclusively" for the word "customarily," as that word is used in Section 24(a)1. For, the two words are inherently contradictory.

The dictionary definitions of the two words clearly demonstrate their non-substitutability:

> "Customarily . . . usually, habitually, according to the customs, general practice or usual order of things." Black's Law Dictionary 462 (Rev. 4th Ed. 1968).
>
> "Exclusively . . . apart from all others . . . only . . . purely . . .

> solely . . . substantially all or for the greater part . . . to the exclusion of all others; without admission of others to participate; in a manner to exclude." Id. at 674, 675.

Moreover, it should be noted that the most restrictive synonym for the word "customarily," "habitually." is itself defined as follows:

> "Customarily; by frequent practice or use." It does not mean entirely or exclusively. Black's Law Dictionary 840 (Rev. 4th Ed. 1968) (Emphasis supplied).

The above definitions clearly indicate that the arbitrator's substitution of the word "exclusively" for the word "customarily" in the instant case was neither reasonable nor rational. Accordingly, as the District Court below recognized, such a substitution could in no way be construed to be within the arbitrator's traditional authority of interpretation. To thus apply the facts of the case to a standard concocted by the arbitrator (i.e., whether the work in question had been heretofore "exclusively" contracted out) rather than the standard agreed upon the the Parties (i.e, whether the work in question had been "heretofore customarily contracted out")

clearly manifests an infidelity on the part of the arbitrator to his fundamental obligation to interpret and apply the terms of the collective bargaining agreement, rather than his own terms, to the facts in issue.

The Fifth Circuit's decision herein that the arbitrator's award was "well founded in the 'essence' of, and more than 'rationally inferable' from the letter and purpose of, the collective bargaining agreement" (see App. A, infra, p. 12-A), thus represents the extent to which this Court's Enterprise Wheel decision has been misinterpreted and misapplied by the lower courts. The Court of Appeals' decision herein illustrates the necessity of a clarification by this Court of the difference between a federal court's substitution of its own judgment for that of an arbitrator and a federal court's complete abandonment of its role as a reviewer of arbitration awards with a "you get what you bargained for" attitude, even where the arbitration award in issue manifests a clear infidelity to the essence of the collective bargaining agreement. It is unquestionably desirable that arbitration be "final and binding" and not subject to "judicial interpretation," but not at a price of surrendering the express and unambiguous terms of a collective bargaining agreement.

While some Circuit Courts have recognized the proper scope of judicial review as set forth by this Court in its Enterprise Wheel decision, other Circuit courts have not. Indeed, the Courts of Appeal have completely failed to translate this Court's Enterprise Wheel decision into a consistent and workable pronouncement of the appropriate extent or limitation of judicial review of an arbitration award. Instead, the courts have fashioned a different standard of judicial review for each case.

Among the various standards employed by the Courts of Appeal have been:

1) The reviewing court should not disturb the award so long as the interpretation of the arbitrator was not arbitrary (Local 7-644 Oil, Chemical & Atomic Workers International Union v. Mobil Oil Company, 350 F.2d 708, 712 [7th Cir. 1965]).

2) The reviewing court should not disturb the award merely because it believes that sound legal principles were not applied by the arbitrator (Dallas Typographical Union, No. 173 v. A. H. Belo Corp., 372 F.2d 577, 581 [5th Cir. 1967]).

3) The reviewing court should interfere "where the arbitrator clearly went beyond the scope of the submission" (Textile Workers Union of America v. American Thread Company, 291 F.2d 894, 897-898 [4th Cir. 1961]).

4) The reviewing court should interfere where "the authority to make . . . the award cannot be bound or legally assumed from the terms of the arbitration agreement" (Truckdrivers and Helpers Union Local 784 v. Ulry-Talbert Company, 330 F.2d 562, 563 [8th Cir. 1964]).

5) The reviewing court should interfere if the arbitrator made a determination not required for the resolution of the dispute (Socony Vacuum Tanker Men's Assoc. v. Socony Mobil Oil Company, 369 F.2d 480 [2nd Cir. 1966]).

6) Construction and interpretation is not for the reviewing court (International Brotherhood of Pulp, Sulfite and Paper Mill Workers Local Union No. 874 v. St. Regis Paper Company, 362 F.2d 711, 714 [5th Cir. 1966]).

7) There should be no review of the merits at all (American Machine and Foundry Company v. Auto, Aerospace and Agr. Implement Workers, 329 F.2d 147 [2nd Cir. 1964]).

8) Review is confined to the question of whether the union agreed to arbitrate or give the arbitrator the power to make the award (Western Iowa Pork Company v. National Brotherhood Packing House and Dairy Workers, 366 F.2d 275, 277 [8th Cir. 1966]).

Not unexpectedly, these various and conflicting standards of judicial review of arbitration awards adopted by the Circuit Courts have resulted in various and conflicting decisions. Nowhere is this more evident than in the instant case. The Court of Appeals' decision herein is in direct conflict with the decisions of other Courts of Appeals in cases involving similar, indeed almost identical, facts as those involved in the case at bar. In a number of cases, cited infra, Circuit Courts have set aside awards of arbitrators which, by adding or ignoring terms of a collective bargaining agreement, manifested an infidelity to the arbitrator's obligation to confine himself to interpretation and application of the agreement before him. There is clearly no substantive distinction between cases which involve an arbitrator's award arrived at by adding or ignoring express terms of a collective bargaining agreement, and the case at bar, which involves an arbitrator's award arrived at by substituting the arbitrator's own terms for the express terms of the agreement.

In Local 342, U.A.W. v. T.R.W., Inc., 402 F.2d 727 (6th Cir. 1968), the Circuit Court refused to enforce an arbitrator's award in which the arbitrator added a provision to the contract. The court noted that the pertinent language of the collective bargaining agreement in issue was not, under any reasonable interpretation, ambiguous. The court went on to hold that, inasmuch as no language in the agreement made the exercise of the rights expressly enumerated therein subject to the ultimate approval of an arbitrator or a court:

> The conduct of the arbitrator, thus approved by the District Court, in reality constituted the addition of terms to a negotiated contract that was neither unclear or incomplete. 402 F.2d at 30.

The Court noted, in language particularly apposite to the instant case:

> It can be assumed that . . . the Company gave some quid pro quo to get [the contract provision in issue] . . . an arbitrator should not be permitted to nullify it. Id. at 731.

The court then concluded that, in obedience with the dictum stated by this Court in Enterprise Wheel, the District Court should have denied enforcement of the arbitrator's award. Accordingly, the decision of the District Court was reversed, with the direction to enter judgment dismissing the complaint seeking enforcement of the award.

As in T.R.W., the arbitrator in the instant case attempted to engraft upon the collective bargaining agreement terms which were not there. Indeed, the instant arbitrator went even further than the arbitrator in T.R.W., by excising an express term of the agreement ("customarily"), before adding his own term ("exclusively"). As in T.R.W., the portion of the collective bargaining agreement in issue was the product of bargaining and the company gave some quid pro quo to get it. Accordingly, the instant arbitrator should not have been permitted to nullify the pertinent contractual language by rewriting it, and the Appellant Court should therefore have refused to enforce the arbitrator's award.

In Amanda Bent Bolt Company v. U.A.W., 451 F.2d 1277 (6th Cir. 1971), the Sixth Circuit, citing language from this Court's decision in Enterprise Wheel, concluded

that the arbitrator's act of ignoring and in effect excising express portions of the collective bargaining agreement went beyond the scope of the arbitrator's authority, and that his award was therefore unenforceable. In the instant case, the arbitrator's act of ignoring and in effect excising an express term of the collective bargaining agreement also went beyond the scope of the arbitrator's authority, and his award should therefore also have been held unenforceable.

Similarly, other circuit courts have not hesitated to set aside awards which were arrived at by adding to or excising express portions of the collective bargaining agreement. In Truck Drivers and Helpers Union Local 784 v. Ulry-Talbert Company, supra, the Eighth Circuit set aside an arbitrator's award which ignored the express portion of the collective bargaining agreement which gave the company the discretion to take the action in issue.

In H. K. Porter v. United Saw Workers, 333 F.2d 596 (3rd Cir. 1964), the Circuit Court refused to enforce a portion of an arbitrator's award which, without any reason, ignored an express provision of the collective bargaining agreement which the arbitrator was commissioned to interpret.

Likewise, in Torrington v. Metal Product Workers, 362 F.2d 677 (2nd Cir. 1966), the Circuit Court refused to enforce an award which added a requirement based on past practice to the express provisions of the collective bargaining agreement. In its Torrington decision, the Second Circuit stated:

> the mandate that the arbitrator should stay within the confines of the collective bargaining agreement . . . requires a reviewing court to pass upon whether the agreement authorizes the arbitrator to expand its express terms on the basis of the parties' prior practice . . . the arbitrator's decision . . . should not be accepted where the reviewing court can clearly preceive that he has derived that authority from sources outside the collective bargaining agreement at issue. 362 F.2d at 680.

The inconsistency with which the Circuit Courts have interpreted the "essence" and "fidelity" dictum set forth in this Court's Enterprise Wheel decision, in cases involving judicial review of an arbitration award, is clearly demonstrated by the fact that said dictum was cited by both the majority and dissenting opinions of the Second Circuit in the Torrington case. 362 F.2d at 680, 682.

In a recent decision, the Sixth Circuit reiterated its intention not to enforce arbitration awards which clearly manifest the arbitrator's infidelity to his contractual obligation. See Timken Company v. Steelworkers, Local 1123, 482 F.2d 1012 (6th Cir. 1973). In Timken, the Circuit Court held that an arbitrator's award based upon an unreasonably restrictive interpretation of a term of the collective bargaining agreement could not be enforced, absent evidence indicating that the parties to the agreement intended such an unreasonably restrictive interpretation of the contractual term in issue. The Sixth Circuit held that the arbitrator was foreclosed "from substituting his discretion for the company and from modifying the language of the agreement." 482 F.2d at 1015. This decision is in clear and direct conflict with the Court of Appeals decision herein.

Finally, in a very recent case, Textron, Inc. v. Auto Workers Local 516, 86 LRRM 3240 (2nd Cir. 1974), the Court of Appeals held that where an arbitrator's award is on its face contradictory, the court should deny enforcement of the award and resubmit the case for further arbitration. As discussed above, the instant case is also on its face clearly contradictory, since the words "customarily" and "exclusively" can in no way

reasonably be considered to be synonymous.

Thus, there are a number of Circuit Court decisions in cases directly analogous to the case at bar, which have held, contrary to the Court of Appeals' decision herein, that an arbitrator cannot add or ignore terms of a collective bargaining agreement and thereby rewrite the provisions which the parties to such agreement have collectively bargained for. These decisions are therefore in direct conflict with the Court of Appeals decision herein. Clarification of the proper role of a court in reviewing an arbitration award is thus necessary, if the dictum set forth in this Court's Enterprise Wheel decision is to be followed without inherent conflict, and if the parties to a collective bargaining agreement are to be afforded a predictable forum for protecting their contractual interests.

II. THE DECISION HEREIN IS OF IMPERATIVE PUBLIC IMPORTANCE TO THE EFFECTIVE OPERATION OF THE RAILWAY LABOR ACT.

The Court of Appeals' decision herein holds, in effect, that a Federal Court is not authorized to review the award of an impartial arbitrator and System Board of Adjustment, even where the award is on its face contradictory and is based on terms concocted by the arbitrator rather than terms agreed upon by the Parties through collective bargaining. Such a decision, if permitted to stand, would do substantial and irreparable damage to the integrity and effectiveness of the System Board of Adjustment process under the Railway Labor Act. For, such a decision amounts to a total abdication of the Court's function as a reviewing body over awards rendered by System Boards of Adjustment.

In its Enterprise Wheel decision, this Court noted that it would be undesirable to require arbitration awards free of ambiguity, for such a requirement "may lead arbitrators to play it safe by writing no supporting opinions," and "a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement." 363 U.S. at 597. Similarly, to hold that a court may not review an arbitrator's award which is not only poorly reasoned, but is in fact based on the arbitrator's own terms and views of industrial justice, rather than the terms of the collective bargaining agreement, would invariably tend to destroy confidence

in the integrity of the process and impair the ability of the statutory system to clarify collective bargaining agreements covered by the Act.

As the Second Circuit noted in its Torrington decision:

> Far from having the disruptive effect upon the finality of labor arbitration which results when courts review the 'merits' of a particular remedy, devised by an arbitrator, we think that the limited review exercised here will stimulate voluntary resort to labor arbitration and thereby strengthen this important aspect of labor-management relations by guaranteeing to the Parties to a collective bargaining agreement that they will find in the arbitrator not a 'philosopher king' but one who will resolve their disputes within the framework of the agreement which they negotiated. 362 F.2d at 682.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this

Petition for Certiorari be granted.

JOHN BACHELLER, JR.
Counsel of Record

WILLIAM F. KASPERS
3500 First National
Bank Tower
Atlanta, Georgia 30303
Attorneys for
Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th day of October, 1974, caused the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT to be served upon the following individuals as counsel for parties to the case by causing three copies thereof for each such party to be deposited in the U. S. Mail, postage prepaid:

Harold Mendelow, Esquire
Manners and Amoon, P. A.
123 Northwest 12th Avenue
Miami, Florida 33128

Erwin N. Griswold, Esquire
Solicitor General
Department of Justice
Washington, D. C. 20530

JOHN BACHELLER, JR.
Counsel of Record for
Petitioner

APPENDIX A

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT NO. 145,

Plaintiff-Appellee,

v.

MODERN AIR TRANSPORT, INC.,

Defendant-Appellant.

No. 73-1345

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

June 20, 1974

Appeal from the United States District Court for the Southern District of Florida.

Before WISDOM, AINSWORTH and GEE, Circuit Judges.

GEE, Circuit Judge:

Modern Air appeals from the district court's enforcement of an arbitrator's award in favor of the Union. Concluding that the court reached the right result,

although through the wrong process, we affirm.

In 1971 Modern Air contracted out some modification and repair work to an outside agency rather than assigning the work to its own facilities. The Union contended that the contracting-out violated the collective bargaining agreement. They sought reinstatement and back pay for laid-off mechanics. Modern Air and the Union duly submitted the grievance to arbitration under the procedure provided in the collective bargaining agreement. The arbitrator found that Modern Air had breached the contracting-out provision of the agreement, and he ordered back pay and reinstatement for those employees improperly laid off.

In respect to contracting-out, the agreement provided:

> (a) All work normally performed in the Company's Maintenance Shops and facilities and airport stations by the employees covered by this Agreement is recognized as coming within the jurisdiction of the International Brotherhood of Teamsters and is covered by this Agreement. When aircraft is placed in the active service of the Company, the periodic maintenance on such aircraft shall be within the scope of this Agreement.

The parties agree that the Company may:

1. Continue to contract out work heretofore customarily contracted out./1/

Initial modification of newly acquired airplanes and jet engine repair work were the subjects of the Union's grievances. On the evidence submitted to him, the arbitrator found that Modern Air had contracted out the bulk of the initial modification work but that the bargaining unit employees had performed some of that

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1. It further provided:
2. Return equipment, parts or assemblies to the manufacturer or to an approved agency for repair or replacement.
3. Purchase necessary parts, equipment or facilities.
4. Contract out any work when the Company's facilities or personnel are not sufficient or available, or where employees available do not have the experience and ability to satisfactorily perform the work required, provided that the above does not result in a reduction in force of the employees covered by this Agreement. In which case representatives of the Company and Union will meet without delay and negotiate the proper provisions for the protection of employees' seniority and other property rights.

work. As to the jet engine repair, he found that the amount of contracting-out had varied over the years according to Modern Air's facilities and other contingencies but, although it had contracted out much of the engine repair, it also had performed a significant amount of the work in its own facilities.

This appeal focuses on the arbitrator's and the district court's interpretation of the term "customarily" in subparagraph 1. The arbitrator reasoned that:

> . . . I do not share the Company's apparent view that so long as there was substantial contracting out of certain work it may "continue to contract out [such] work" because of subparagraph 1 of subsection (a). To my mind, in the light of the basic thrust of subsection (a) to place "work normally performed" in the bargaining unit and in view of the limitations specified in subparagraph 4 of subsection (a) with regard to contract out "any work," there would appear to be and [sic] implication in the use of the words "customarily" in subparagraph 1 of subsection (a) that the authority specified therein relates to work that has been <u>exclusively</u> contracted out. Stated differently, it is my view that subparagraph

1 does not refer to work which has been both contracted out as well as performed by the bargaining unit./2/

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2. The arbitrator's reasoning proceeded: In the instant case, while I am not at all convinced that bargaining unit employees have performed "initial" modification work to the extent that the Union here claims and, indeed, while I am equally convinced that the bulk of the "initial modification work has not been performed by bargaining unit employees, although tasks performed in connection with such work may well have been performed by bargaining unit employees from time to time after aircraft have been placed in a revenue status, the fact remains that some "initial" modification work has been performed by bargaining unit employees and it cannot thus be concluded that such work has been "exclusively" contracted out. This is equally true for engine repair work involving hot section overhauls, as is plainly evident from the detailed recital above of what was done by whom with respect to various engine repair work. Accordingly, I do not regard subparagraph 1 of subsection (a) as determinative of the issue presented herein.

I find subparagraphs 2 and 3 of subsection (a) of Section 24 equally inapplicable in the instant situation. These provisions appear to have been

The district judge decided to "enforce the award for reasons completely different from those in the arbitrator's report: [W]here the arbitrator substitu-

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included to make crystal clear the Company's right to resort, where necessary, to a manufacturer or to an approved agency for repairs or replacement of parts or assemblies, etc. but to conclude that in the instant situation the Company was authorized to contract out the work simply because "an approved agency" was involved would prove too much, in my opinion, since virtually all contracting out could then be authorized so long as "an approved agency" was involved and there would thus be little, if any, need to include subparagraphs 1 and 4 of subsection (a) of Section 24.

Essentially, authorization for the Company's contracting out for the work here being grieved must be found in subparagraph 4. As I read that provision the Parties intended to provide substantial flexibility to the Company to obtain the performance of all work required to keep its equipment operative. However, the Parties equally and plainly intended that the Company's right to contract out "any work" would be circumscribed to the extent that if a reduction in force of bargaining unit employees would occur then the Company and Union would meet and pro-

ted the word 'exclusively' for the word 'customarily,' as it is used in subparagraph (a)1 . . ., it is completely improper." But the court went on to examine the facts in light of its own interpretaion of the agreement and concluded that the arbitrator would have reached the same result using "customarily."

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tect employees' seniority and other property rights. Thus, the Company could contract out work where its facilities or personnel are not sufficient or available or where employees able to perform the required work are not sufficiently experienced or skilled to perform the required work, so long as the Company and Union meet to protect employees in the event a reduction of force then occurs.

To my mind, the limitations specified in subparagraph 4 on the Company's right to contract out "any work" places a burden not upon the Union, as the Company here argues, but rather on the Company itself to demonstrate that its facilities or personnel are not sufficient or available etc. Stated differently, the Company has the right to contract out under given circumstances and it thus behooves the Company to demonstrate the existence of such circumstances when it seeks to exercise its right.

On appeal, Modern Air contends that, when the district court said the arbitrator could not interpret "customarily" to mean "exclusively," the court had found that the arbitrator exceeded his authority. Modern Air goes on to insist that, when the court reached that conclusion, then it should have proceeded no further but should have simply denied enforcement.

On the other hand, the Union contends that the court did not substitute its judgment for that of the arbitrator; rather, the court made the proper inquiry and determined by examining the entire clause that the arbitrator acted properly and within the scope of the agreement./3/

At this point, we insert the law. The genesis, of course, was the trilogy. /4/. The Court there delineated the limitations on the arbitrator:

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3. The parties do not dispute that the grievance was properly arbitrable.

4. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); United Steelworkers of America v. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S. Ct. 1347, 4 L.Ed.2d 1409 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

> . . . [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424, 1428 (1960).

We have expressed the limitation in terms of "foundation in reason or fact":

> In the arbitration context, an award "without foundation in reason or fact" is equated with an award that exceeds the authority or jurisdiction on the arbitrating body. To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement. The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his authority. When he is no longer carrying out the agreement or when his position cannot

> be considered in any way rational, he has exceeded his jurisdiction. The requirement that the result of arbitration have "foundation in reason or fact" means that the award must, in some logical way, be derived from the wording or purpose of the contract. Brotherhood of RR Trainmen v. Central of Georgia Ry. Co., 415 F.2d 403, 411-412 (5th Cir. 1969).

Additionally, in Safeway Stores v. American Bakery Workers Union Local 111, 5 Cir., 390 F.2d 79, 81-82, we said:

> "[I]f the award is arbitrary, capricious or not adequately grounded in the basic collective bargaining contract, it will not be enforced by the courts." . . . On its face the award should ordinarily reveal that it finds its source in the contract and those circumstances out of which comes the "common law of the shop."

See, Dallas Typographical Union v. A. H. Belo Corp., 372 F.2d 577 (5th Cir. 1967).

A concomitant narrow standard restricts judicial review of the arbitrator's broad authority:

> . . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the

> arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his. Enterprise, supra, 363 U.S. at 599, 80 S.Ct. at 1362, 4 L.Ed.2d at 1429.

As we said in Safeway Stores, supra at 81:

> . . . [W]e must be vigilant that we are not slipping off into that habit, easy for Judges, of "deciding the merits in the guise of adjudicating the court-reserved issue of the scope . . . of the agreement to arbitrate."

The court must not "[resume] its traditional role of assaying the judicial acceptability of the award had it been a court judgment." Safeway Stores, supra at 83.

[1] Although the district court's action here was ambiguous, we conclude that, by finding that the arbitrator could not interpret "customarily" to mean "exclusively," the court found that the arbitrator had exceeded his authority. Then, when the district court went on to interpret the contract, the court itself improperly "[resumed] its traditional role of assaying the judicial acceptability of the award." The proper course for the district court would have been to deny enforcement upon the finding that

the arbitrator manifested an "infidelity to his obligation." Enterprise, supra.

[2] That conclusion, however, does not end our inquiry. The district court, in deciding that the arbitrator could not equate "customarily" with "exclusively," mistook fundamental authority for contract interpretation--the arbitrator's proper function.

Analyzing the arbitrator's reasoning, he performed the traditional function of one delegated to resolve contractual disputes. He interpreted and gave meaning (exclusively) to an ambiguous (customarily) contract term in light of the other provisions and purposes of the contract. His award was well founded in the "essence" of, and more than "rationally inferable" from the letter and purpose of, the collective bargaining agreement. United Steelworkers v. United States Gypsum Co., 492 F.2d 713 (5th Cir. 1974); Amalgamated Meat Cutters, Local 540 v. Neuhoff Bros. Packers, Inc., 481 F.2d 817 (5th Cir. 1973). Neither the district court nor we have any "business overruling him because [our] interpretation of the contract is different from his." Enterprise, supra.

We find ourselves thus in agreement with the district court's result but in disagreement with his method. In effect, we are directly approving the arbitrator's

award. As this is not unprecedented, when it fully resolves the issue between the parties in a protracted dispute, San Antonio Newspaper Guild, Local 25 v. San Antonio Light Division, 481 F.2d 821 (5th Cir. 1973),/5/, we affirm the district court's order.

Affirmed.

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5. Additionally, our action does not contravene Judge Godbold's dissent in that case because here the arbitrator has reached and decided the merits of an issue undisputedly within his authority.

APPENDIX B

IN THE DISTRICT COURT
OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF FLORIDA

No. 72-791-Civ-PF

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
DISTRICT NO. 145,

Plaintiff,

v.

MODERN AIR TRANSPORT, INC.,

Defendant.

North Courtroom
U.S. Post Office Building
Miami, Florida
Monday, 5:30 p.m.
November 13, 1972

The above-entitled case came on for trial before the Honorable PETER T. FAY, United States District Judge, pursuant to notice.

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FINDINGS OF FACT

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THE COURT: Thank you, sir.

Well, gentlemen, I am constantly amazed at the opinions that District Court judges are called upon to render and would be the first to profess my limited contact with a case such as this. It is about the same experience I have with running public schools.

Not unlike what other courts have done, I am going to grant the petition. I am going to enforce the award for reasons completely different from those in the arbitrator's report, and I suppose really a little different from what you all have argued.

I want the record to show very clearly why I am doing what I am doing so that, if I am wrong, someone else can correct that.

Let me start at the beginning.

I think first if we deal with, and we talk about areas--if we deal with the area where the arbitrator substituted the word "exclusively" for the word "customarily," as it is used in Subparagraph A-1 of Section 24, it is completely improper. I think it is so clearly improper as to not really deserve much more comment.

There is no way he can do that, in my opinion.

Now, the problem I have, as you have probably gathered from my questions, is I do not think that ends the matter, because I think that the arbitrator broke this into two phases, and that in reviewing the entire situation in the two phases, I think his decision, his ultimate decision, is quite proper, using the provisions of Section 24 as it is written.

I say that for these reasons: I think that the initial modification work was customarily contracted out. He goes to great lengths to point out factually, I think, in his report that that is the situation and that the only initial modification work that was done was done on a piecemeal basis and along with routine maintenance that any substantial initial modification was customarily contracted out.

Now, then, going to the area where Modern Air Transport does complain--and I never remember the language because I am just not that familiar with it, but it would be in the engine work. When we get into the area of the engine work, I frankly agree completely with the arbitrator's interpretation of Subparagraph 2 of Section 24. I just don't think you can read it any other way. Any other interpretation would just completely eliminate

the necessity for Paragraphs 1, 3 and 4. They just wouldn't have any meaning, and I do not think they were put there just as surplusage.

I think a reasonable interpretation of Subparagraph 2, really Subparagraph A-2 of Section 24, has to have some reasonable limitations, and I think that is what the arbitrator felt.

So, I find his interpretation of Subparagraph A-2 to be completely reasonable and consistent and certainly within his authority.

Then, taking that within his authority, I think of necessity he had to go to Subsection A-4 of Section 24, and I cannot find that his ruling is improper because, as I say, from my question I think he did two things. I think he would have arrived at the same result had he used the word "customary" as he should have.

In other words, as the word "customarily" is used in Subparagraph A-1, I think his conclusion would have been that you then have to look at the factual circumstances, and although I think he could have found, I think any reasonable arbitrator could have found that the jet engine work was customarily contracted out.

He would also look to the facts that Modern Air set up the engine facilities,

they trained their men in jet engine work; that this customarily contracting out had changed, and I think the facts show very clearly that it had changed to the point where they were contracting it out when their employees and their shop could not handle it.

I think that of necessity that immediately took him to Subparagraph A-4 under Section 24 in this instance, when there was, in fact, a layoff.

I believe again we get to the months of September and October of 1971.

So I think what he did was correct. I do not think it was correct for the reasons he used because, as I said, I think he was completely improper in substituting the word "exclusive" for "customarily."

I think the result would have been exactly the same and was completely proper using the language of the contract. I think that is what he did. I think that is what he had to do.

As I say, I guess I am enforcing it for reasons completely different from those he stated, and really a little bit different from what you all argued.

Maybe I should not do that, but I want the record to show very clearly that

is what I am doing and why I am doing it, because if I cannot do that, then I suppose I either have to set it aside or send it back to him. However, I see no reason to send it back to him because I think for the reasons he has already stated very clearly in the record, he would have to arrive, of necessity, if he used the same facts that he uses, with the same result.

I see no reason to send it back to him and say, "Do it again and don't substitute the word 'exclusive,' " because I think he would end up, of necessity, using the word "customarily" in A-1 and then finding factually that the circumstances had changed and thereby going to A-4, where you get into the situation of well, what's happening; when they are contracting it out, are the facilities and the personnel sufficient; and, if not, did they sit down with the union and try to work it out to avoid a layoff?

I think this is completely consistent with the provisions of the contract. I do this as a rank amateur in this field.

Now, if you want anything more formal than this, I will ask the prevailing party to draw it up or the court reporter cantype this up and I will be glad to sign it as the order granting the petition and enforcing the arbitrator's report and order.

However you all want to handle it.

MR. RHOADS: Your Honor, if I may, we have one problem.

THE COURT: Sure.

MR. MENDELOW: We may have.

MR. RHOADS: We may have.

MR. MENDELOW: We may have several problems.

MR. RHOADS: We have several problems or may have several problems directed at compliance with this, assuming that we do not take an appeal.

THE COURT: Sure.

MR. RHOADS: Modern Air shut down its entire base, maintenance base, in December of last year, the last day of December, and has not employed mechanics since that time.

The arbitrator was aware that this was going to happen. The parties told the arbitrator to ignore it insofar as his---

THE COURT: I was going to say, he mentions it, but he says it has not happened, hasn't he, in his report?

MR. MENDELOW: At the time. It happened approximately in January of 1972.

MR. RHOADS: The last day worked was the last day of December, 1971.

THE COURT: I don't mean to jump over any problems or preclude argument.

You can probably tell from my opinion that I would take those facts into consideration. If they did not have a shop, I think you can guess what my rulings are going to be, because mine are based upon just what I told you.

MR. MENDELOW: There are additional facts.

American Aeromotive, as you know, is a subsidiary or a sister company to Modern Air under the GAC corporate structure. Right now they are, from what I understand, flying airplanes or jets into New York and shipping down engines to American Aeromotive to do the hot section overhaul. They are operating very successfully, from what I understand, over in Berlin, Germany, with these same aircraft that they have flown over there now.

THE COURT: Or would it go back to the arbitrator first?

MR. MENDELOW: No. I believe under Gunther, this Court could make the decision.

First of all, I think in our relief in this court we asked the Court to require the company to meet with us to see if we can sit down and settle this thing amicably. That has been our only demand of the company up until the time we had to come to court, Your Honor.

As an alternative for this Court, if this Court feels it ought to order that at least and we cannot come to any agreement with regard to this, I would ask the Court to appoint someone to determine damages in lieu thereof.

THE COURT: I would always encourage the parties to try to resolve it first, because I think you all can both see pretty clearly where I am going and what I am going to do.

As I say, mine is based on the changing circumstances and if they had the shop and they operate, so be it. That is what I would think the purview would be. If they had not had the shop, if they did not have the mechanics, there is no question in my mind what my eventual ruling would probably be.

As I say, I say that without precluding anybody from arguing and presenting whatever evidence they want to.

MR. MENDELOW: Would the Court make that part of his order, that we do sit down?

THE COURT: Certainly. Sure would.

MR. MENDELOW: We are ready, willing and able to sit down with them at any time.

THE COURT: Oh, yes.

MR. MENDELOW: And discuss this thing amicably, I'm sure.

THE COURT: Sure, yes.

MR. RHOADS: Could we have the transcript of your order?

I would be agreeable to that in an order.

Would you, Mr. Mendelow?

MR. MENDELOW: Yes, I would, too.

THE COURT: Certainly.

MR. MENDELOW: With that addition to it, that the Court required the parties to sit down.

THE COURT: Yes. The Court would specifically request that the parties sit down and discuss the announced ruling of the Court in an attempt to resolve all of the administrative matters that have to be taken care of and handled to implement it.

What I would do is enter this by way of a final order. I would probably close the case administratively, but I would retain jurisdiction.

MR. MENDELOW: That is what we want the Court to do.

THE COURT: For any proceedings necessary to enforce the judgment in accordance with the announced final order.

MR. MENDELOW: Thank you.

MR. RHOADS: Thank you, Your Honor.

THE COURT: Thank you very much.

It is an interesting proposition. As I say, I am delighted to be educated. If you appeal it, so be it. Maybe the appellate court can aid me in my education.

MR. RHOADS: Just something to chew on for a little bit.

(Thereupon the hearing was concluded.)

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 72-791-Civ-PF

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT NO. 145,

Plaintiff,

v.

MODERN AIR TRANSPORT, INC.,

Defendant.

FINAL JUDGMENT

THIS MATTER came on for trial before the Court without a jury and pursuant to the findings of fact and conclusions of law entered upon the record on November 13, 1972, it is --

ORDERED AND ADJUDGED that judgment is hereby entered in favor of the plaintiff and against the defendant and the award of the arbitrator shall be enforced.

DONE AND ORDERED at Miami, Florida this 30th day of November, 1972.

s/ Peter Fay
United States District Judge

APPENDIX D

In the Matter of Arbitration

MODERN AIR TRANSPORT, INC.,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 145

Grievances Involving Alleged Violation of Section 24 -- Scope of The Agreement -- By Contracting Out of Work

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BEFORE: Laurence E. Seibel,
Impartial Arbitrator

Appearances:

For the Company

James B. Rhoads, Esq.
Claude T. Sullivan, Jr.,Esq.
Fisher & Phillips
Atlanta, Georgia

For the Union

Joseph P. Manners, Esq.
Manners and Amoon
Miami, Florida

Statement of the Case.

The Union filed a number of grievances alleging that the contracting out of the modification or conversion of certain CV-990s violated the Agreement executed in July 1967 and that the contracting out of minor engine repairs and hot section overhaul repairs violated the Agreement executed in December 1970. It seeks an award compensating employees in the Company's maintenance shops, facilities and airport stations covered by the Agreement for the work lost as a consequence of the contracting out of such work.

Specifically, the Union filed grievances dated November 23, 1970, November 30, 1970 and March 1, 1971 concerning the "farming out" of modification and conversion of four CV-990s, namely, aircraft numbered 601, 614, 623 and 625; a grievance dated July 15, 1971 concerning the contracting out of engine repair work on engines with serial numbers 151, 181 and 202; a grievance dated September 13, 1971 concerning the contracting out of engine repair and sheet metal work which caused the layoff of five mechanics, and the Union requested cessation of the subcontracting and the cancellation of the layoff notices; a grievance dated October 20, 1971 concerning the contracting out of engine and sheet metal work which caused the layoffs of five additional employees,

and the Union requested reinstatement of such employees with back pay; and a grievance dated October 31, 1971 concerning another contracting out violation resulting in layoffs of three additional employees and the Union requested their reinstatement with back pay.

As is evident from the foregoing, the grievances essentially fall into two groups: one relating to modification and conversion of aircraft and the other relating to engine repair work.

1. Modification and Conversion of Aircraft. The grievances filed on November 23, 1970, November 30, 1970 and March 1, 1971 relate to the modification of four aircraft from the configuration of the seller to the configuration desired by the purchaser. Generally speaking, a company acquiring aircraft specifies the configuration in which it will operate the aircraft and then appropriate modification must be made subject to Federal Aviation Agency requirements. The work involved in modifying an aircraft to the acquiring company's configuration and in accomplishing hitherto unperformed FAA modifications is, according to the Company, termed "initial modification." Subsequent modification, once the aircraft is in service, is undertaken from time to time to meet operational requirements or to meet new FAA regulations or to satisfy FAA requirements which

periodic inspections indicate are not being met. Such subsequent modification is undertaken on an "as required" or "as necessary" basis in a manner, where ever possible, to minimize "down" time.

From April 1967 to the beginning of 1971 the Company acquired ten Convair 990 jet aircraft. The Parties are only in agreement that the work here being grieved with respect to aircraft numbered 601, 614, 623 and 625 was work performed by an outside company, namely, American Airmotive Corporation, and that all subsequent modification was performed by Company mechanics, including the reinforcement of the main landing gear beams (spar modification) on aircraft 603 and 615. However, with respect to the first six aircraft acquired by the Company, while the Company asserts that "the record is uncontroverted that no initial modification work was performed by unit employees on the first CV-990 aircraft acquired by the Company" and that "all initial modification work was performed by American Airlines or their designee," it is the Union's assertion that the first aircraft (#605) acquired was initially leased to Air France but upon its return conversion was performed "to conform it to numbers 607 and 609," two aircraft which had previously been acquired by the Company and converted by bargaining unit employees. Concededly, some of the conversion work on aircraft

605 was performed by Air France. With respect to aircraft numbered 607, the Union asserts that conversion to the Company's configuration was not done all at once but rather "a little at a time." The Union further asserts that aircraft numbered 603, 615 and 617 were also converted to Company configuration by bargaining unit employees.

The Company concedes that aircraft numbered 603 was one on which the complete initial modification was performed by bargaining unit employees, and, also, that with respect to aircraft numbered 615 the plane was delivered without seats and bargaining unit employees installed seats in the 134 configuration. In connection with such work, the Company asserts, approximately 30 additional mechanics were temporarily hired to handle the increased work load since modification had to be undertaken while the active fleet had to be maintained; these temporary employees were terminated after completion of the modification work.

With respect to aircraft numbered 605, 607, 609 and 617 the Company asserts that the initial modification work was accomplished by American Airlines or its designee. Such modification included converting each aircraft from 110 seats set up in two classes, four galleys and four lavatories to the Company's configuration of 134 seats set up in one class,

two galleys and four lavatories.

2. Engine Repairs. Prior to 1967, the Company had an engine shop performing repair work on piston engines but as the utilization of jet aircraft increased the engine shop was phased out and finally it was closed. However, in the latter part of 1968, the Company posted bids for mechanics for the engine shop which was reactivated for jet engine repair early in 1969. For the following year or so the repair work performed was minor in nature with major engine work being farmed out. Early in 1970, the Company had several members of the engine shop trained by Delta Airlines in Atlanta in hot section overhauls and starting in June 1970, Company mechanics performed hot section repair work.

The "hot section" of a jet engine is the area in which the combustion of fuel occurs and the areas to the rear thereof, including the turbines and the fan. Overhaul of such section is required by FAA regulations after the engine has flown a certain number of hours; also, when other repair on the engine requires its dismantling and the engine has flown almost the number of hours specified in the FAA regulation, a hot section overhaul may be deemed economically advisable in addition to the other repair work that must be done. Such hot section overhaul has been performed by the engine manufacturer, (Gene-

ral Electric), American Airmotive (which is an approved agency for the repair of the engine in question) and the Company's own engine shop under the authority of its operating certificate; both American Airmotive and the Company's own engine shop have sent out parts needing repair to General Electric. The Company's engine shop performed hot section overhauls on eight engines from June 1970 through June 1971, with six of the eight having been completed prior to the arbitration hearing. Actually, the work here being grieved relates to various engines having "hot section" overhauls made in connection with other repair which the Union regards as "minor" but which the Company asserts involved either foreign object damage or high exhaust gas temperature or high vibrations or high oil consumption or shipping damage.

Prior to December 28, 1970, hot section overhauls had been performed or begun on eighteen engines, fourteen of which were subcontracted to General Electric; eight were removed strictly for hot section overhaul and of these eight four were performed by bargaining unit employees. Subsequent to December 28, 1970 nine engines received hot section overhauls, of which six were contracted out to American Airmotive (all of which were grieved) and three were begun by, or waiting for, bargaining unit employees; one of the three was completed in Septem-

ber 1971, another had begun in July 1971 and was not complete by the arbitration hearing date and the third had not been begun at the time of the hearing.

Prior to December 28, 1970, some engines experiencing foreign object damage were repaired by an outside contractor and some by bargaining unit employees. During the same period seven engines were repaired for excessively high vibrations, six by an outside contractor and one by bargaining unit employees. Also, during the same period, the one engine repaired for high exhaust gas temperature was done by an outside contractor and of the eight engines repaired for high oil consumption, six were subcontracted and two were repaired by bargaining unit employees. Three other engines were repaired for minor oil leaks by bargaining unit employees.

Section 24, the "scope clause" of the Agreement executed December 28, 1970 reads as follows:

SCOPE OF THE AGREEMENT

SECTION 24

"(a) All work normally performed in the Company's Maintenance Shops and facilities and airport stations by the employees covered by this Agreement is recognized as coming within the

jurisdiction of the International Brotherhood of Teamsters and is covered by this Agreement. When aircraft is placed in the active service of the Company, the periodic maintenance on such aircraft shall be within the scope of this Agreement.

"The parties agree that the Company may:

"1. Continue to contract out work heretofore customarily contracted out.

"2. Return equipment, parts or assemblies to the manufacturer or to an approved agency for repair or replacement.

"3. Purchase necessary parts, equipment or facilities.

"4. Contract out any work when the Company's facilities or personnel are not sufficient or available, or where employees available do not have the experience and ability to satisfactorily perform the work required, provided that the above does not result in a reduction in force of the employees covered by this Agreement. In which case representatives of the Company and Union will meet without delay and negotiate the

proper provisions for the protection of employees' seniority and other property rights."

Section 24 in the Agreement of December 28, 1970 is identical with the "scope clause" of the preceding Agreement except for the final sentence in subparagraph (a) which was added in 1970.

Contentions of the Parties.

1. Modification and Conversion. The Union contends that all modification of all aircraft in service was done by bargaining unit employees.

In essence, the Union argues that the modification work done on aircraft numbered 601, 614, 623 and 625 is work coming within the contractual restrictions concerning the contracting out of work. Such modification cannot be considered "work heretofore customarily contracted out" since the history of jet planes used by the Company is too recent to conclude that any modification work was "customarily" contracted out. Indeed, modification to conform new aircraft to the Company's configuration was customarily not contracted out but was performed by bargaining unit employees as early as April 1967, which was three months before the Agreement went into effect. Aircraft numbered 603, for example, was different from American Airlines CV-990s and had to be

completely modified by bargaining unit employees. Moreover, other CV-990s had to have spar modification and repair, which was work that was never before contracted out and, indeed was an integral part of maintaining the fleet. With respect to the reason given by the Company that it did not have the capacity to perform the modification work on aircraft 601 and 614, the Union points out that bargaining unit employees modified six other aircraft and that the Company and American Airmotive share the same hangar. And, the Union notes, the Company received aircraft numbered 623 and 625 during a slow period when bargaining unit employees were performing certain work at American Airmotive ramps, which space was available, the Union asserts, to the Company.

The Union maintains that the Company has the equipment to perform the modification work, the unit has the skill to perform the work and the Company has the facilities and capacity to perform all conversion and modification of aircraft to its configuration. Indeed, the conversion of certain aircraft was accomplished a little at a time as part of the bargaining unit's normal and customary work. The Union also maintains that there has existed no emergency which would support or necessitate the contracting out of work which was usually and customarily performed by bargaining unit employees

and, further, that such contracting out resulted in the reduction of the units work force in the fall of 1970 as compared with the size of the unit in November 1969.

Finally, the Union contends that the Company violated subsection 24(a)(4) since it unilaterally assigned four aircraft to American Airmotive for modification without engaging in negotiations designed to protect the property rights of laid off employees. It further charges that the Company had an interest in American Airmotive and wanted to keep that Company's work force busy.

The Company contends that "initial" modification work was performed on aircraft numbered 605, 607, 609 and 617 by American Airlines or its designee, that initial modification on aircraft number 615 was also performed by American Airlines except that bargaining unit employees installed the seats in the 134 configuration and that initial modification on aircraft number 603 was performed by bargaining unit employees with the help of additional personnel temporarily hired. With respect to aircraft numbered 601, 614, 623 and 625, it is the Company's position that its facilities were inadequate to modify these aircraft and at the same time service the Company's active fleet; moreover, on aircraft numbered 623 and 625 spar modification was authorized

as part of the "initial" modification when inspection revealed cracks in the main landing gear beams which were close to the tolerable limit. The Company concedes that subsequent modification was performed by Company mechanics including spar modification.

The Company contends that while its employees had at one time or another performed each of the modification tasks required in an "initial" modification, nevertheless, with one exception, such employees only performed this work as part of the periodic maintenance of such aircraft after the aircraft was placed in the Company's revenue producing service. Stated differently, the Company maintains that subsequent modification was the work normally performed by its employees but such work is not the subject of the instant grievances. Moreover, the Company points out that when the bargaining unit performed its only "initial" modification on aircraft number 603, thirty temporary employees had to be hired, and it can thus hardly be said that "initial" modification was "work normally performed" in the Company's facility.

In any event, the Company contends, Section 24 provides four separate and distinct exceptions, one of which permits the Company to contract out work heretofore customarily contracted out. Initial modification, the Company maintains, has

always been customarily contracted out, as is evident from the fact that aircraft numbered 607 and 609, the only aircraft acquired before July 1967 (the effective date of the previous Agreement) were initially modified by American Airlines, and, as of October 1970, of the six aircraft acquired up until that time, the "initial" modification on all but one had been contracted out. In this connection, the Company further contends that the words "heretofore customarily contracted out" should refer to July 14, 1967 concerning the first two grievances and to December 1970 for the 1971 grievances.

Finally, with respect to the modification grievances, the Company argues that the Union has not demonstrated that the Company's facilities or personnel were sufficient or available. The Company points out that at the time of the subcontracting being grieved no unit employees were on layoff status. Moreover, no evidence was submitted to show that the Company's facilities or personnel were sufficient to perform both the work here being grieved and the maintenance of the Company's active fleet. On the contrary, in the one instance when the Company performed "initial" modification it became necessary to hire temporary employees. The Company points out that the Company's Vice President for Technical Services testified that ramp space was inadequate to perform "initial" modification on four

aircraft over a six month period and also to maintain the active fleet, testimony that was neither rebutted or contradicted.

2. Engine Repair Grievances. The Union maintains that engines numbered 151 and 202 were sent to American Airmotive for minor repairs normally performed by bargaining unit employees and upon their return it was discovered that a hot section overhaul had also been performed. It also maintains that engine number 110 was sent to American Airmotive for minor repairs traditionally performed by bargaining unit employees on September 10, 1971 after the Company had announced layoffs of five employees. Similarly, on September 28, 1971 at the time that the first layoffs were effected and the second layoff of eight members of the bargaining unit were announced, engine number 132 was sent to American Airmotive for a hot section overhaul. It is also asserted that in October 1970 engines numbered 160 and 170 were sent to American Airmotive for engine repair either traditionally performed by the bargaining unit or which might have been given to the unit. Moreover, it is further contended by the Union that engine number 221 which had been awaiting a hot section overhaul was sent to American Airmotives on September 13, 1971, after the layoffs had been announced; this engine had been waiting for repair for some time because, the Union alleges, the Company cross utilized

the unit's mechanics on line maintenance and, as a consequence, the unit also lost all of the other sheet metal, electrical, welding and minor repairs that were involved.

The Union concedes that during the period in which the Company's engine shop was not functioning engines were sent out for cold section overhauls and foreign object damage repair, that in the case of engines numbered 151 and 202 the bargaining unit did remove certain parts and repair them for use in other aircraft and that time extension evaluations to determine whether hot section overhauls were needed were sent to General Electric because the Company was not equipped to do the layout.

The Union argues that the intent of the Company in reopening its engine shop was to perform more minor repair work and eventually to perform hot section overhauls and that to accomplish this purpose the Company acquired additional hangar space, purchased parts and equipment and had members of the unit trained in hot section overhauls. Accordingly, in June 1970 bargaining unit employees were performing the work which the Company intended them to be performing and such work was performed for approximately one year without complaint. However, the Union charges, the Company began cross utilizing engine shop employees by requiring them to

work on maintenance of the fleet and eventually as a consequence of the contracting out of work some 13 members of the unit were laid off in September and October 1971. This contracting out of work, undertaken unilaterally by the Company without negotiation as required by the Agreement, and without an emergency situation existing, resulted in the layoffs and was violative of the Agreement.

The Company contends that the Union's basic premise is that once bargaining unit employees are capable of performing certain repairs and have performed those repairs then the Company may no longer contract out the work. This basic premise, it argues, is not only contrary to the language of the "scope clause" but contrary to its intent, namely to provide flexibility to the Company to contract out maintenance work. In this connection, the Company points out that during negotiations the Union proposed to amend the "scope clause" so that it would have the right to the work which Union employees were capable of performing but this proposal was rejected by the Company and the flexibility was retained. Thus, the Company concludes, the Union is here seeking to accomplish by arbitration what it failed to obtain by negotiation.

The Company contends that sometimes engine repair work of the type here in

question was performed by unit employees and sometimes by an outside contractor and, indeed, initially when the Company operated without an engine shop such repair work was accomplished solely by contracting out. This contracting out continued even after the opening of the engine shop and it thus cannot be concluded that such work is "normally" performed by bargaining unit employees and thus subject to Section (a) of the "scope clause."

Moreover, under subsection 1 of Section (a) the Company may "continue to contract work heretofore customarily contracted out" and prior to December 28, 1970 the type of engine work here under consideration had been consistently contracted out. Furthermore, the Company maintains, the Union failed to demonstrate that the subcontracting was not permitted as the return of equipment, parts and assemblies to an approved agency for repair. American Airmotive is an "approved agency," namely, one approved by the FAA to repair the GE engine here in question up to and including full overhaul.

Finally, the Company argues that the Union has failed to establish that layoffs were caused by the subcontracting or that such layoffs adversely affected the Company's right to subcontract the work in question under subsection (a)1 & 2 of Section 24 of the "scope clause." In this

connection, the Company points out that subsections 1 to 4 of subsection (a) set forth separate and distinct exceptions which permit Company contracting out of work, but only in subsection 4 are layoffs mentioned. Accordingly, the Company concludes, the layoff proviso in subsection 4 only applies to the conditions enumerated in subsection 4, and had the Parties intended such proviso to apply to subsections 1 to 3 they could have readily done so by drafting the proviso as part of subsection (a) itself. It is therefore the Company's position that it may contract out under subsections 1 to 3 of subsection (a) regardless of whether such contracting out causes layoffs since the proviso does not apply to such subsections and the Company is not relying on subsection 4 to justify the contracting out here involved. Moreover, the Company maintains, it has not been shown that the layoffs were directly caused by the contracting out. What has been shown is simply that layoffs occurred while the contracting out occurred. Admittedly, several engines were awaiting work in the Company's engine shop during this period of time and while the Union seeks to explain this by asserting cross utilization of employees precluded the performance of work on such engines, no testimony was offered to that effect by the Union. On the other hand, a Company official testified that cross utilization has always been necessary to keep the Airline running

and a mechanic is required to perform "any and all work generally recognized as mechanical" rather than only a particular class of work, such as "sheet metal," "engine," etc.

Discussion and Opinion.

Careful consideration of all portions of Section 24, the "scope clause", makes it clear that while the Parties provided that "all work normally performed" comes "within the jurisdiction of the [Union] . . .", nevertheless the Parties clearly intended to provide considerable flexibility to the Company with respect to the contracting out of work.

The different circumstances under which such contracting out of work may be effected are set forth above, not only in the recital of the provisions of Section 24 but also in the detailed "Contentions of the Parties" and particularly the Company's contentions. While I am in agreement with the Company's view that the language in subparagraph 1 of subsection (a) concerning "work heretofore customarily contracted out" refers to the practice existing prior to the effective date of the Agreement (as held in Arbitrator Greene's decision), I do not share the Company's apparent view that so long as there was substantial contracting out of certain work it may "continue" to contract out [such] work" because of subparagraph 1

of subsection (a). To my mind, in the light of the basic thrust of subsection (a) to place "work normally performed" in the bargaining unit and in view of the limitations specified in subparagraph 4 of subsection (a) with regard to contracting out "any work," there would appear to be an implication in the use of the words "customarily" in subparagraph 1 of subsection (a) that t e authority specified therein relates to work that has been exclusively contracted out. Stated differently, it is my view that subparagraph 1 does not refer to work which has been both contracted out as well as performed by the bargaining unit. In the instant case, while I am not at all convinced that bargaining unit employees have performed "initial" modification work to the extent that the Union here claims and, indeed, while I am equally convinced that the bulk of the "initial" modification work has not been performed by bargaining unit employees, although tasks performed in connection with such work may well have been performed by bargaining unit employees from time to time after aircraft have been placed in a revenue status, the fact remains that some "initial" modification work has been performed by bargaining unit employees and it cannot thus be concluded that such work has been "exclusively" contracted out. This is equally true for engine repair work involving hot section overhauls, as is plainly evident

from the detailed recital above of what was done by whom with respect to various engine repair work. Accordingly, I do not regard subparagraph 1 of subsection (a) as determinative of the issue presented herein.

I find subparagraphs 2 and 3 of subsection (a) of Section 24 equally inapplicable in the instant situation. These provisions appear to have been included to make crystal clear the Company's right to resort, where necessary, to a manufacturer or to an approved agency for repairs or replacement of parts or assemblies, etc. but to conclude that in the instant situation the Company was authorized to contract out the work simply because "an approved agency" was involved would prove too much, in my opinion, since virtually all contracting out could then be authorized so long as "an approved agency" was involved and there would thus be little, if any, need to include subparagraphs 1 and 4 of subsection (a) of Section 24.

Essentially, authorization for the Company's contracting out for the work here being grieved must be found in subparagraph 4. As I read that provision the Parties intended to provide substantial flexibility to the Company to obtain the performance of all work required to keep its equipment operative. However, the Parties equally and plainly intended

that the Company's right to contract out "any work" would be circumscribed to the extent that if a reduction in force of bargaining unit employees would occur then the Company and Union would meet and protect employees' seniority and other property rights. Thus, the Company could contract out work where its facilities or personnel are not sufficient or available or where employees able to perform the required work are not sufficiently experienced or skilled to perform the required work, so long as the Company and Union meet to protect employees in the event a reduction of force then occurs.

To my mind, the limitations specified in subparagraph 4 on the Company's right to contract out "any work" places a burden not upon the Union, as the Company here argues, but rather on the Company itself to demonstrate that its facilities or personnel are not sufficient or available etc. Stated differently, the Company has the right to contract out under given circumstances and it thus behooves the Company to demonstrate the existence of such circumstances when it seeks to exercise its right.

In the instant case, during a substantial period of time in which the concerned contracting out was effected, there was no reduction in force of bargaining

unit employees and it could thus be reasonably concluded that at such times the Company's facilities and personnel were not sufficient or available to perform all of the work that was required and it thus became necessary to resort to the contracting out of work in order to keep its operation or equipment functioning. The fact that bargaining unit employees could have also performed the contracted out work affords no basis for the view that the Company was obligated to "pile up" such work for the bargaining unit employees for such time as other work would slacken. And, the fact that the Company has cross utilized, in the Union's terms, bargaining unit employees to perform flight maintenance work on aircraft as well as modification and engine repair work does not justify the Union's view that the work should not have been contracted out. Nothing in this Agreement precludes the Company from so utilizing bargaining unit employees and there is no obligation on the Company's part to hold over required work for ultimate assignment to bargaining unit employees who are otherwise currently occupied on other bargaining unit tasks.

As I see it, then, the problem here becomes one of determining whether the layoffs that occurred in September and October 1971 were the result of contracting out work when the Company's facilities and skilled personnel were sufficient and

available to perform the work required. While it may not be entirely clear in any given situation that the contracting out of work at a time when all employees are employed (for an example, in August) caused a layoff which subsequently occurred (for example, in September), certainly a very serious question arises where the contracting out of work is undertaken at a time when employees actually are on layoff or have been notified that a layoff will shortly occur. In this case, the Company contracted out engine work on engine number 111 on September 10, 1971, on engine number 132 on September 28, 1971, on engine number 170 on October 1, 1971 and on engine number 221 on September 13, 1971. All of this contracting out occurred at a time when layoffs were either imminent or had occurred; five men were laid off in September 1971 and eight additional men in October 1971.

That there were layoffs when work was being contracted out is quite clear. The crucial question then becomes one of ascertaining whether the circumstances, as specified in subparagraph 4 of subsection (a), existed. Essentially, the Company appears to be justifying its contracting out on the grounds that the facility was inadequate for performing the grieved work, but apart from the assertion itself in that regard the record is not at all clear that such inadequacy

existed. The responsible Company official testified that he "laid off from various sections trying to maintain a steady level of mechanics in the engine build-up section," that he and other Company officials were engaged in "grinding the entire airline down," that in July, August and September 1971 the shop was fully occupied in turning out what it had as well as keeping aircraft flying and he did not want to add additional men (instead of contracting out the work) because he doesn't "believe in the Union's concept of bringing people in off the street" and that he "laid off as the flight loads diminished." In the light of this testimony it does not appear that the adequacy of the facility was the basis for contracting out the work. In any event, the record is insufficient, in my opinion, to demonstrate precisely how the facility was inadequate or personnel unavailable; the Company has not met its burden of demonstrating the inadequacy of the facility or the unavailability of properly trained and experienced personnel. Stated differently, under a subparagraph 4 situation, if employees are on layoff or are about to be laid off, and the Company contracts out work which has been performed by bargaining unit employees in the past, such layoffs must be considered, prima facie, as having been the "result," within the meaning of subparagraph 4, of such contracting out; the burden then shifts to

the Company to demonstrate the inadequacy of the facility available or the unavailability of properly trained and experienced personnel (either laid off or still on the payroll) to perform the work required, and, in my opinion, this burden has not been met by the Company. Under these circumstances I am constrained to conclude that the contracting out of engine repair work in September and October 1971 when mechanics were either on layoff or when layoffs of mechanics had been announced was violative of Section 24(a)(4) of the Agreement.

Since the Union has commented upon the fact that Modern Air and American Airmotive are both owned by a parent company, it may not be amiss to state that, in my opinion, for the purposes of Section 24 of this Agreement, mere common ownership does not affect the right of Modern Air to contract out to American Airmotive as it, Modern Air, may do to any appropriate FAA approved agency. The adequacy of the Modern Air facilities must be evaluated on the basis of its own leasing arrangements.

While on this record it does not appear that the work contracted out was, or was not, sufficient to utilize fully, or for what period, the services of all mechanics laid off in September and October of 1971, the Submission Agreement dated October 30, 1972 provides:

"4. That if the arbitrator finds the subcontracting in question to be in violation of the current collective bargaining agreement between the parties, and if he further finds the employees have been laid off as a direct result of the subcontracting found to be in violation of said collective bargaining agreement, MODERN shall not oppose the reinstatement of such employees with no loss in pay."

Accordingly, I am constrained to so order.

Award.

The Company is directed to reinstate with full seniority those employees who were laid off in September and October 1971 when the contracting out of engine repair work was effected in violation of Section 24 (a)(4) of the Agreement, and the Company shall reimburse all such employees for all loss of pay.

/s/ Laurence E. Seibel
Laurence E. Seibel,
Arbitrator

March 29, 1972